Community Electric Service of Los Angeles, Inc. ***and*** **Local Union No. 440, International Brotherhood of Electrical Workers, AFL-CIO.** Case 21-CA-21567

31 July 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 28 April 1983 Administrative Law Judge Gerald A. Wacknov issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and affirms the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The complaint alleges that since about 28 July 1982 the Respondent has refused to bargain collectively with Local Union No. 440, International Brotherhood of Electrical Workers, AFL-CIO (the Union), in violation of Section 8(a)(5) and (1) of the Act, by failing and refusing to make certain "subsistence payments" to its employees as provided by their collective-bargaining agreement, the Inside Wiremen's Agreement, without first notifying the Union and affording it an opportunity to bargain. The judge found that the subsistence payments are not a mandatory subject of bargaining and, therefore, the Respondent did not violate the Act by unilaterally refusing to make such payments. We disagree.

The Respondent is an electrical contractor with its principal place of business in Los Angeles, California. In preparation for procuring work in the Palm Springs area, on 28 July 1981[1] the Respondent authorized the Southern Sierras Chapter of the National Electrical Contractors Association (NECA) to be its collective-bargaining representative and agreed to be bound by the current Inside Wiremen's Agreement between NECA and the Union. The current Inside Wiremen's Agreement, like the predecessor agreements, provides that, if the employer's shop is located more than 18 miles from the jobsite, the employer is required to pay employees as "travel expenses" an amount calculated on the basis of the distance from the employer's shop to the jobsite on a per-mile basis up to a maximum of $35 per day. The $35 maximum payment is referred to in the contract as subsistence. If an employer does not have a shop within the Union's territorial jurisdiction when the job begins, however, the contract establishes the Riverside, California Post Office as the location of the employer's shop for the duration of the job. Should an employer wish to establish a shop within the Union's territorial jurisdiction, it must be established a minimum of 90 days before the job begins and the contract authorizes the Union to determine whether a shop has, in fact, been established.

For the purpose of establishing a shop within the Union's territorial jurisdiction, the Respondent leased an office on 1 August in the Palm Springs area, but did not occupy it until 1 October. On 2 November the Respondent began its first job within the Union's territorial jurisdiction at the Indio Community Hospital. It was to be completed in 1983. Shortly after the job began, the Respondent realized it would have to pay each employee an extra $35 per day as travel expenses because the Union had determined that the Respondent had not established an office within the Union's territorial jurisdiction more than 90 days before the job began. The Respondent filed a grievance pursuant to the contract, but on 17 March 1982 the Labor Management Committee concluded that the Union had not violated the contract and that, therefore, the Respondent was required to continue making the subsistence payments until the job was completed. The Respondent continued making payments through 28 July 1982 when it unilaterally discontinued the payments. In September 1982 the employees working on the Respondent's job engaged in a brief work stoppage which was settled when the parties agreed, inter alia, to resolve the matter through the grievance procedure or litigation so that the job could be completed.[2]

The judge concluded that the contract's characterization of the $35-per-day payment as subsistence pay is a "sham" under the circumstances of this case. He found that, because the payment does not constitute reimbursement for expenses incurred while traveling from home to the job, it bestows a "windfall" on employees and a "penalty" on the Respondent for not having established a shop 90 days before the Indio Community Hospital job began. The purpose of the subsistence pay provisions, according to the judge, is to prevent employers from bidding on jobs within the Union's juris-

[1] All events occurred in 1981 unless otherwise indicated.

[2] No party has urged in its exceptions that there is a basis for deferral of this case under *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955). Further, no exceptions have been filed with respect to the judge's rejection of the Respondent's contention that it had a right to repudiate the contract because the work stoppage was in violation of a no-strike provision.

diction.[3] The judge further analogized this case to *Arlington Asphalt Co.*,[4] in which the Board did not consider a proposed provision which would require a union to indemnify an employer for unlawful secondary boycott activity to be a mandatory bargaining subject because the provision related to the employer's security rather than to a benefit for the employees. While the judge recognized the "direct albeit unearned benefit" the employees receive from the subsistence pay provisions, he characterized the employees as in effect third-party beneficiaries and found that the primary beneficiaries are the parties to the contract who have a continuing interest in maintaining a competitive advantage. Accordingly, the judge concluded that the subsistence pay here is not a mandatory bargaining subject and the Respondent did not violate Section 8(a)(5) and (1) by discontinuing such payments without notice to or the consent of the Union during the term of their collective-bargaining agreement.

Contrary to the judge, we find that the subsistence pay here is a mandatory bargaining subject. Section 8(d) of the Act defines mandatory bargaining subjects as "wages, hours, and other terms and conditions of employment." Citing *NLRB v. Borg-Warner Corp.*,[5] the Board has interpreted Section 8(d) of the Act as follows:[6]

> While the language is broad, parameters have been established, although not quantified. The touchstone is whether or not the proposed clause sets a term or condition of employment or regulates the relation between the employer and its employees.

Consistent with the broad interpretation of Section 8(d), it is well settled that the term "wages" in that section of the Act includes "'emoluments of value' which accrue to the 'employees out of their employment relationship'" in addition to the actual rate of pay earned.[7] The subsistence pay at issue in the instant case is clearly encompassed by this broad construction of the term "wages." Pursuant to the contract, employees receive subsistence pay only if they report to work.[8] To that extent, such pay constitutes compensation by the employer for services rendered by the employees and, thus, directly affects the employment relationship. Furthermore, because the contract requires an employer to make subsistence payments in accordance with specified criteria and at a fixed rate, subsistence payments are received on a regular basis in the employees' paychecks and become part of the employees' wage expectancy. We find, therefore, that the subsistence pay is part of the employees' wages just like any other supplement to the actual rate of pay and constitutes a mandatory bargaining subject.

In *Electrical Workers IBEW Local 401 (Stone & Webster)*,[9] we recently concluded that contractually provided subsistence payments similar to those involved in the present case are properly included as a component of gross backpay due a discriminatee.[10] In that case the collective-bargaining agreement required the employer to pay all employees working on projects located beyond a certain distance from the intersection of two highways an extra $16.65 per day as subsistence payments. The purpose of these payments was to offset living expenses and to induce employees to accept employment at relatively distant locations. However, they were made automatically regardless of whether the employee actually incurred any expense or inconvenience and without requiring any proof of expenses incurred. All the employees had to do to receive the payments was to report to work. The subsistence payments, therefore, were found to be part of the employees' wages like any other daily premiums paid to employees.

The similarity between the subsistence payments involved in *Stone & Webster* and those involved in this case is striking. In the instant case an employee becomes eligible for subsistence payments on a per-mile basis up to a maximum of $35 per day if the jobsite is located more than 18 miles from the employer's shop, whereas in *Stone & Webster* an employee was eligible for a flat $16.65 per day if the jobsite was located more than a certain distance from the intersection of two highways. Thus, in both *Stone & Webster* and in the present case, employees were required to report to work to be eligible for the subsistence payments and in both cases the employer was required to make the pay-

[3] In view of his conclusion that subsistence pay provisions did not constitute a mandatory bargaining subject, the judge found it unnecessary to pass on the antitrust implications of the provisions, but he commented that they were worthy of "serious consideration."

[4] 136 NLRB 742 (1962), enfd. 318 F.2d 550 (4th Cir. 1963).

[5] 356 U.S. 342 (1958).

[6] *Operating Engineers Local 12 (AGC of America)*, 187 NLRB 430, 432 (1970).

[7] *McDonnell Douglas Corp.*, 224 NLRB 881, 886 (1976), citing *Inland Steel Co. v. NLRB*, 170 F.2d 247 (7th Cir. 1948).

[8] While the contract provides for payment for every "day worked," that term is specifically defined as "at least one-half of the regularly scheduled workday. If on a regularly scheduled workday, due to unfavorable weather, lack of material or facilities, or for the employer's convenience, an employee is not permitted to work, he shall notwithstanding be paid subsistence on such day."

[9] 266 NLRB 870 (1983).

[10] In a backpay proceeding an employer is only liable for payments on matters involving mandatory bargaining subjects. See *Fox Painting Co.*, 263 NLRB 437 (1982), and cases cited. It is well settled that the Board applies the same principles in defining the term "wages" in the context of an employer's collective-bargaining obligation that it applies in backpay proceedings. See *W. C. Nabors Co.*, 134 NLRB 1078, 1087 (1961).

ments if the jobsite were located more than a certain distance from a fixed point. Accordingly, we conclude that the subsistence payments here, like those in *Stone & Webster*, are part of the employees' wages and constitute a mandatory bargaining subject.

In so concluding, we reject the judge's finding that the subsistence pay constitutes a nonmandatory subject of bargaining because it is a sham. The judge's characterization of the subsistence pay as a sham is premised on his finding that the real purpose of the subsistence pay provisions is to prevent employers from bidding on jobs within the Union's jurisdiction.[11] However, we do not find the parties' motivation in agreeing to a contractual provision relevant to the determination of whether the provision is a mandatory bargaining subject. Contrary to the judge, the Board's function in applying Section 8(d) is not to sit in judgment on the substantive terms of collective-bargaining agreements.[12] By focusing on the purpose of the subsistence pay provisions of the contract rather than their effect on the employment relationship,[13] the judge improperly substituted his own judgment for that of the parties to the contract. Where, as here, a contractual provision, which is lawful under the Act, constitutes "wages," "hours," or "other terms and conditions of employment" within the meaning of Section 8(d) of the Act, a party cannot unilaterally make a midterm change in the provision regardless of its underlying purpose.

Finally, for similar reasons we reject the judge's finding that the subsistence payments are a windfall. According to the judge, the subsistence pay constitutes a windfall because in his view employees who have done nothing for it receive it regardless of where they reside. However, in finding that the subsistence pay constitutes wages, we noted that such pay is compensation for services rendered because it is conditioned on employees' reporting to work. Moreover, in our view the windfall an employee receives here is no greater than the windfall an employee receives whenever a flat rate or per diem is used to calculate reimbursement for expenses rather than a method which reflects actual expenses incurred. And, we note that in finding the subsistence pay in *Stone & Webster* to constitute a mandatory subject of bargaining, we rejected any distinction between reimbursement for expenses likely to be, but not necessarily, incurred and those actually incurred. Finally, we conclude that the parties to the contract, not the Board, are charged with determining which method of reimbursement best suits their needs.[14]

Based on all the foregoing, we conclude that the subsistence pay here is a mandatory bargaining subject and that, by unilaterally and without the Union's consent discontinuing subsistence payments due employees pursuant to the contract, the Respondent has made a midterm modification of the contract in derogation of its bargaining obligation under Section 8(d) of the Act. Accordingly, we further conclude that the Respondent has thereby violated Section 8(a)(5) and (1) of the Act.

REMEDY

Having found that the Respondent has engaged in unfair labor practices, we shall order that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent unlawfully discontinued subsistence payments to employees on the Indio Community Hospital project since about 28 July 1982 as required by the Inside Wiremen's Agreement then in effect, we shall order it to honor and give retroactive effect to the terms and conditions of the Inside Wiremen's Agreement relating to subsistence pay and make its employees whole for losses suffered by reason of its failure to honor and apply the provisions of the Agreement, with interest, to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), and in *Florida Steel Corp.*, 231 NLRB 651 (1977).[15]

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

[11] We do not pass on the antitrust implications of the subsistence pay provisions because our function here is not to determine whether they violate the antitrust laws. See *Evening News Publishing Co.*, 196 NLRB 530, 535 (1972). As an administrative agency which is empowered to administer the National Labor Relations Act, we only determine whether the discontinuance of the subsistence payments violates that Act.

[12] *NLRB v. American Insurance Co.*, 343 U.S. 395, 404 (1952); *Evening News Publishing Co.*, supra at 535.

[13] As noted above, the judge relied on *Arlington Asphalt Co.*, supra, a case involving a proposed indemnity provision to protect the employer from the union's unlawful secondary boycott activity, to support his conclusion that the subsistence pay here does not relate to a benefit for the employees. In contrast to *Arlington Asphalt Co.*, supra, the subsistence pay here directly involves the relationship between the Respondent and its employees.

[14] See *NLRB v. American Insurance Co.*, supra, and *Evening News Publishing Co.*, supra.

[15] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

All inside wiremen and all other electrical workers, including those electrical workers employed in the classifications of general foreman, foreman, journeyman wireman, journeyman technician, cable splicer-foreman, welder, and apprentice wireman, employed by the employer-members of the Southern Sierras Chapter, National Electrical Contractors Association, Inc., and by employers who have authorized the Chapter to act as their representative for the purposes of collective bargaining on all inside electrical construction work in Riverside, California.

4. At all times material herein, the above-named labor organization has been and is now the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing since about 28 July 1982, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of the employees of the Respondent in the appropriate unit, specifically by unilaterally and without the Union's consent discontinuing subsistence payments due the unit employees pursuant to the Inside Wiremen's Agreement, the Respondent has made a midterm modification of the contract in derogation of its bargaining obligation under Section 8(d) of the Act, and thereby has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) of the Act.

6. By the acts described above, the Respondent has refused to bargain with the Union and has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

The National Labor Relations Board orders that the Respondent, Community Electric Service of Los Angeles, Inc., Los Angeles, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally and without the consent of the Union discontinuing subsistence payments due employees under the Inside Wiremen's Agreement between Southern Sierras Chapter, National Electrical Contractors Association, Inc., and the Union or otherwise unilaterally modifying the provisions of any such contract during its term.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Honor and give retroactive effect, from about 28 July 1982, to the terms and conditions of its Inside Wiremen's Agreement relating to subsistence pay, and make its employees whole for the losses incurred by them as a result of the Respondent's failure to honor and apply the provisions of the contract in the manner set forth in the section of this decision entitled "Remedy."

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay and other redress due under the terms of this Order.

(c) Post at its Los Angeles and Palm Springs, California places of business copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[16] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT unilaterally and without the consent of Local Union No. 440, International Brotherhood of Electrical Workers, AFL–CIO, fail and refuse to make subsistence payments due you under the Inside Wiremen's Agreement between us and the Union or otherwise unilaterally modify the provisions of any such contract during its term.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL honor and give retroactive effect to the terms and conditions of our Inside Wiremen's Agreement with the Union as it relates to subsistence pay, and

WE WILL make each of you whole for the losses incurred as a result of our failure to honor and apply the subsistence pay provisions in the Inside Wiremen's Agreement since about 28 July 1982, with interest on the amounts due.

COMMUNITY ELECTRIC SERVICE

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice, a hearing with respect to this matter was held before me in Los Angeles, California, on February 24 and 25, 1983. The initial charge was filed on September 8, 1982, by Local Union No. 440, International Brotherhood of Electrical Workers, AFL–CIO (the Union).

Thereafter, on October 29, 1982, the Regional Director for Region 21 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing alleging a violation by Community Electric Service of Los Angeles, Inc. (Respondent) of Section 8(a)(1) and (5) of the National Labor Relations Act.

The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from the General Counsel, counsel for Respondent, and counsel for the Charging Party.

On the entire record, and based on my observation of the witnesses and consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, an electrical contractor with its principal place of business in Los Angeles, California, annually purchases and receives products, goods, and materials valued in excess of $50,000 directly from suppliers located outside the State of California. It is admitted, and I find, that the Respondent is, and has been at all times material herein, an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted that the Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issue*

The principal issue raised by the pleadings is whether Respondent has violated Section 8(a)(5) and (1) of the Act by failing to adhere to certain contractual terms and conditions of employment as embodied in a collective-bargaining agreement.

B. *The Facts*

On July 28, 1981, Respondent's owner and president, Gus Shouse, signed a document entitled "Letter of Assent-A" which authorized the Southern Sierra Chapter of the National Electrical Contractors Association (NECA) to be Respondent's collective-bargaining representative and bound Respondent to the current Inside Wiremen's Agreement, and successive agreements negotiated between NECA and the Union, until such time as Respondent, in writing, terminated the authorization. At this time, Respondent had no work within the Union's jurisdiction but, in preparation for procurring work, commenced to establish a place of business or "shop" in Palm Springs, California. The prior (June 1, 1981, through May 31, 1982) and current collective-bargaining agreements to which Respondent was a party at times material herein contain the following provisions applicable to this proceeding:

Contractors Place of Business

> Sec. 2.07. When a Contractor establishes a place of business as herein defined within the jurisdiction of the Union, recognition of such "shop" shall be determined by Local Union 440, IBEW. When such shop is recognized by the Union, any job which the Employer has in progress shall continue to operate with no change in place of reporting, travel allowance or per diem until its completion. Any dispute over refusal by the Union to recognize an Employer's established place of business as a "shop" shall be subject to the grievance procedure set forth in this Agreement. Ninety days has been determined as the minimum period of time to establish recognition.
>
> Sec. 2.08. A place of business means an office, shop or premises where the Employer or his designated representative can normally be reached by telephone and by personal call, and where the Employer receives his mail and conducts the ordinary tasks of operating his business. Trailers, portable buildings or an answering service shall not meet these requirements.

Travel Time and Travel Expense

Sec. 3.20. The Employer shall pay for traveling time and furnish transportation from shop to job, job to job, and job to shop when workmen are directed to report to the shop.

There shall be established one eighteen (18) mile radius free zone from the main Post Office in the city where the Employer's permanent place of business is located within the territorial jurisdiction of IBEW Local Union 440. When an Employer does not have a permanent place of business located in the territorial jurisdiction of IBEW Local 440, the Employer shall have an eighteen (18) mile radius free zone from the main Post Office in the City of Riverside. When directed to do so the workmen shall report, free of cost to the Employer, to any job located within the specific Employer's eighteen (18) mile radius free zone.

When a workman is directed to report to a job located outside an Employer's free zone, the workman shall be paid travel expense computed on the basis of thirty cents (30¢) per mile from the perimeter of the applicable free zone to the job and return trip to the perimeter each day. When travel expense payment amounts to thirty-five dollars ($35.00) per day, the job shall then be classified as a subsistence job.

Subsistence Jobs

Sec. 3.21. All jobs with travel expense payments of thirty-five dollars ($35.00) per day shall be classified as subsistence jobs, and subsistence shall be paid for at the rate of thirty-five dollars ($35.00) per day worked. For this purpose "day worked" shall mean at least one-half of the regularly scheduled workday. If on a regularly scheduled workday, due to unfavorable weather, lack of material or facilities, or for the Employer's convenience, an employee is not permitted to work, he shall notwithstanding be paid subsistence on such days.

Respondent commenced its first job under the applicable provision of the contract on November 2, 1981, at the Indio Community Hospital, in Indio, California, approximately 18 miles from Palm Springs where Respondent's office was located. Under the foregoing contract provisions, had Respondent established and maintained a "shop" in Palm Springs for 90 days prior to November 2, 1981, Respondent would have been able to avoid the application of the provisions of the contract which required the payment of travel or subsistence expenses, as the Indio Community Hospital job was apparently within the 18-mile radius free zone, established by the contract from Palm Springs. However, if Respondent had not established and maintained its shop in Palm Springs for 90 days prior to November 2, then it would have to pay each of its employees $35 per day extra as subsistence expenses because the shop of an employer with no established or recognized shop, according to the contract, is nominally designated as being located in Riverside, California, which is some 77 miles from the Indio Community Hospital jobsite. Moreover, the subsistence payments do not end when the shop has been established for 90 days, but rather the payments, once begun, are due and payable for the duration of the job.

When, shortly after November 2, 1981, Respondent realized it would be required by the Union to pay the subsistence payments, it sought to grieve the matter through NECA, its collective-bargaining representative.[1] However, due to delays attributed to Respondent by Robert Shaw, secretary-manager of the Southern Sierra Chapter of NECA, and attributed to Shaw by Respondent, the Labor Management Committee did not meet to resolve the problem until March 16, 1982. At the meeting, Leland Brand, then assistant business manager of the Union, presented the Union's position that the Respondent had not maintained its shop in Palm Springs for 90 days prior to the commencement of the Indio Community Hospital job. Gus Shouse testified that he believed Shaw was obligated to represent Respondent's interests in the proceeding, and was surprised when, at the meeting, Shaw and the other contractors seemed to favor the Union's position and, contrary to the purpose of the meeting, generally questioned Shouse about his solicitation of business in the area. On the following day, March 17, 1982, Gus Shouse received a letter from Gilbert Davey, then secretary and business manager of the Union, advising that the Labor Management Committee found no violation by the Union of the applicable provisions of the contract, and that therefore Respondent was obligated to continue making the subsistence payments.

Respondent continued to make the subsistence payments until July 28, 1982, when it ceased making the payments without notification to the Union. As a result, there was a brief work stoppage which commenced on September 2, 1982, but thereafter the parties agreed that the matter would be resolved through the grievance procedure or litigation so that Respondent could carry on its work and the members of the Union, who had been replaced, could continue to be employed on the job. The job, which commenced on November 2, 1981, was to be completed in 1983. Through July 28, 1982, when Respondent discontinued the subsistence payments, it had paid some $23,000 in subsistence which, had it established an office in Palm Springs on August 1, 1981, approximately 90 days prior to the commencement of the job, would have not been required.

Assistant Business Manager Leland Brand was responsible, during times material herein, for determining whether Respondent had established and maintained a shop in Palm Springs for the requisite length of time. He testified that, after the Union had been notified of the existence and address of such a shop, he made several trips to the purported office and found the door locked and an empty suite of rooms. When he stopped by on October 6, 1981, he was told by the building manager that Respondent had not yet moved in, but was supposed to get a telephone installed that very day. Then Guy Shouse, son of Gus Shouse, drove up in a truck with some files

[1] Respondent became a member of NECA in October or November 1982.

in it. Brand introduced himself and asked if they were getting moved in. Guy Shouse said yes. Brand then walked into the office which was empty.

Guy Shouse, estimator and vice president of Respondent, testified that he had moved into the office on August 1, 1981, and on approximately that date delivered a computer and certain furniture to the office. The furniture, according to Guy Shouse, was on loan from an office design and furnishings company pending receipt of other furniture which Respondent intended to purchase. In this regard, Respondent introduced into evidence a proposal from the furniture company dated September 15, 1981, addressed to Respondent's Los Angeles, California location rather than its Palm Springs address, listing numerous items of furniture totaling over $7,000, for purchase by Respondent. The document shows that Gus Shouse approved it on September 17, 1981, and apparently the furniture was delivered thereafter. The letter does not mention, however, that Respondent had any furniture on loan from the company, nor did Respondent introduce any documentary evidence tending to show that such furniture had been either loaned or delivered to Respondent at any time. Further, it was admitted that there was no telephone in the office until sometime after October 6, 1981, ostensibly, according to Gus Shouse, because the phone service for the new complex where the office was located had not been available until that date. However, Gus Shouse testified that in July he had explained this situation to the Union's business manager, Gilbert Davey, who said that under the circumstances it would be permissible for Respondent to use the phone number at the residence where two of its managerial employees, who were investigating business potential in the area, had been living. Davey denied that he had any such conversation with Gus Shouse concerning the telephone.

Apparently there was a labor management meeting on September 22, 1982. On October 21, 1982, the Union's attorney wrote to Respondent advising that "On September 22, 1982, you were found in violation of that agreement, with respect to the Indio Hospital Project, that the award was $9,205.00, and that in the event payment is not made to each of the employees specified therein, we are authorized to proceed with enforcement of the award in the Riverside Superior Court . . . ." Instead, however, the Union has pursued the matter through the Board.[2]

C. *Analysis and Conclusions*

I credit the testimony of Leland Brand and find that the Union, in good faith, concluded that no shop had been timely established pursuant to the contract, and that the Labor Management Committee, in good faith, agreed. Although the intent to open an office was exhibited by Respondent, and Respondent took occupancy of the office premises on August 1, 1981, and continued to pay rent thereafter, I credit Brand's conversation with Guy Shouse on October 6, 1981, and find that Respondent did not move into the office until on or about that date. It is highly significant that Guy Shouse did not contradict Brand's testimony regarding this conversation in any respect. Moreover, had the Respondent moved in on August 1, 1981, as it contended, there would have been receipts for the delivery of the loaned office furniture. No such receipts were proffered by Respondent, nor was there any explanation given for the absence of such receipts. Obviously, as there was no telephone installed in the premises until sometime in October, it would have been pointless to attempt to operate a business out of that location prior to that time. I find that Respondent did not occupy the office until sometime in October 1981.

Respondent also argues that it had not one contract or job with the Indio Community Hospital but a succession of individual contracts, some of which commenced after January 1982, the time when the Union agreed that Respondent's office had been established for 90 days. This contention is also without merit. The record shows that what Respondent refers to as new contracts were not contracts competitively placed for bid, but rather were "bulletins" issued by the general contractor upon which the Respondent submitted a price for approval.[3] At no time prior to the hearing herein did Respondent maintain that these bulletins were, in effect, new contracts, and it appears that such a contention is merely an afterthought advanced for purposes of this hearing. As no other contracts were competitively bid, it is clear that Respondent was engaged in only one job which commenced on November 2, 1981, and continued thereafter until 1983.

Respondent argues that it had a right to repudiate the contract because of the illegal strike called by the Union on September 2, 1982, in violation of a no-strike clause. However, the record shows that thereafter Respondent reinstated the striking employees and continued to adhere to the contract except for the subsistence pay provisions. Assuming arguendo that the strike constituted a material breach sufficient to permit the aggrieved party to rescind the contract,[4] Respondent did not do so but rather only elected to refuse to adhere to part of it. I find Respondent's contention to be without merit.

In support of the complaint allegation, the General Counsel, citing various cases,[5] maintains that Respond-

[2] Counsel's explanation for not proceeding to collect the award in the Riverside Superior Court is that the amount owed by Respondent continued to increase and it was the opinion of the Union's counsel that the court would not take cognizance of the matter without a fixed sum being alleged in the court suit. Now that the project has been completed, however, it would appear that this contention is no longer viable, as the sum purportedly owed by Respondent could readily be determined.

[3] The collective-bargaining agreement contains the following provision:

> Individual Contract—Separate Job
>
> Sec. 2.13. Each individual contract that a contractor receives for work on a building, a group of buildings, or other electrical work that a contractor has received *by competitive bid* shall be considered as a separate job. [Emphasis added.]

[4] See *Dow Chemical Co.*, 244 NLRB 1060 (1979).

[5] *Struthers Wells Corp.*, 245 NLRB 1170 (1979); *Rego Park Nursing Home*, 230 NLRB 725 (1977); *Keystone Steel & Wire*, 237 NLRB 763 (1978); *Sun Harbor Manor*, 228 NLRB 945 (1977); *Fairfield Nursing Home*, 228 NLRB 1208 (1977); *Oak Cliff-Golman Baking Co.*, 207 NLRB 1063 (1973).

ent's conduct constitutes a substantial breach of the agreement and a repudiation of the bargaining relationship with the Union.

The rationale underlying the finding of a violation in the foregoing cases was expressed by the Board in *Oak Cliff-Golman Baking Co.*, supra.

> It cannot be gainsaid that an employer's decision in midterm of a contract to pay its employees for the remainder of the contract's terms at wage rates below those provided in the collective-bargaining agreement affects what is perhaps the most important element of the many in the employment relationship which Congress remitted to the mandatory process of collective bargaining under the Act. Because so substantial a portion of the remaining aspects of a bargaining contract are dependent upon the wage rate provision, it seems obvious that a clear repudiation of the contract's wage provision is not just a mere breach of the contract, but amounts, as a practical matter, to the striking of a death blow to the contract as a whole, and is thus, in reality, a basic repudiation of the bargaining relationship. We believe the jurisdiction granted us under the Act clearly encompasses not only the authority but the obligation to protect the statutory process of collective-bargaining against conduct so centrally disruptive to one of its principal functions—the establishment and maintenance of a viable agreement on wages.

Here, the General Counsel argues that subsistence and travel pay are arguably but another form of wages. Citing *Midstate Telephone Corp.*, 262 NLRB 1291 (1982), for the proposition that subsistence pay (per diem and travel pay for the union's negotiating committee) has been deemed to be a mandatory subject of bargaining which vitally affects the relations between an employer and employee to the extent that unilateral abrogation of this practice is considered a violation of the Act, the General Counsel argues that a similar result should obtain in the instant case. See also *Alexson, Inc.*, 234 NLRB 414 (1978).

While the payment of $35 per day to Respondent's employees is denominated as "subsistence" pay in the contract, this characterization under the circumstances herein is but a sham. In reality, the employees are not being paid for legitimate expenses incurred as a result of having to travel to get to the job. Rather, they are entitled to daily "subsistence" pay of $35, pursuant to the contract, even if they reside down the block from the job. Clearly and simply, the contract provisions in question, no more and no less, bestow a windfall on the employees who have done nothing to warrant such largess, and a penalty to Respondent which has unfortunately found itself in the position of being in the right place, but not for a long enough time.

While the antitrust implications of these contract clauses appear to be deserving of serious consideration,[6] nevertheless I shall dismiss this case for failure of either counsel for the General Counsel or the Union to demonstrate that subsistence pay, under the circumstances of this case, is a mandatory subject of bargaining, or that its purpose is other than to attempt to place a substantial roadblock in the path of employers who may wish to bid on jobs within the geographical jurisdiction of the Union.

In *Arlington Asphalt Co.*, 136 NLRB 742 (1962), enfd. 318 F.2d 550 (4th Cir. 1963), the employer insisted that the contract contain an indemnity provision which would protect it in the event of unlawful secondary boycott activity by the union. The Board, finding the proposal to be a nonmandatory subject of bargaining, states:

> In principle, the instant case is not much different from those involving performance bonds. Under these decisions, it is well established that such subjects are not deemed mandatory and that an employer's insistence upon such a provision as a condition to signing an agreement violates Section 8(a)(5).[6] Likewise, a union violates Section 8(b)(3), the corresponding refusal-to-bargain section, by insisting that an employer post a performance bond as a condition precedent to executing a collective-bargaining agreement.[7] Thus, under these precedents, Respondent's indemnity proposal cannot be found to be a mandatory subject because it, like the performance bond, is related to security for the contracting party (the Respondent) rather than relating to a benefit or security for the employees.

As noted above, the various provisions which, in combination, required such subsistence payments to employees, constitute a direct albeit unearned benefit to them. In effect, however, the employees are third party beneficiaries, and it would appear that the primary beneficiaries of such provisions are not the employees, but rather the various parties to the contract who have an interest in maintaining a competitive advantage. Indeed, only in the unusual circumstances obtaining herein do the employees receive their windfall, but the benefits which accrue to the employers under these provisions are continuous. I therefore find that the provisions, as applied to Respondent herein, are nonmandatory in nature. As the Board stated in *Keystone Steel & Wire*, 237 NLRB 763 (1978),

[6] In view of the determination of this matter herein, it appears unnecessary to deal with Respondent's contentions that the contract provisions constitute a prima facie antitrust violation, citing *Mine Workers v. Pennington*, 381 U.S. 657 (1965), under the Sherman Anti-Trust Act, as amended, 26 stat. 209, 15 U.S.C. Sec. 1, 2, and the Clayton Act, 15 U.S.C. Sec. 17, and that such matters are cognizable by the Board in the instant proceeding. See *Carpenters v. United Contractors Assn. of Ohio*, 484 F.2d 119 (6th Cir. 1973); *Asbestos Workers v. United Contractors Assn.*, 483 F.2d 384 (3d Cir. 1973), and also supplemental decision at 494 F.2d 1353 (1974).

[6] *Jasper Blackburn Products Corporation*, 21 NLRB 1240; *Dalton Telephone Company*, 82 NLRB 1001, enfd. 187 F.2d 811 (C.A. 5); *E. A. Taormina et al., d/b/a Taormina Company*, 94 NLRB 844; *Cosco Products Company*, 123 NLRB 766.

[7] *Henry V. Rabouin d/b/a Conway's Express*, 87 NLRB 972; *Local 164 et al., Brotherhood of Painters, Decorators and Paperhangers of America* v. *N.L.R.B. (A. D. Cheatham Painting Co.)*, 293 F.2d 133 (C.A.D.C. 1961), enfg. 126 NLRB 997, cert. denied 368 U.S. 824.

supra, citing *Chemical Local 10 v. Pittsburgh Glass Co.*, 404 U.S. 157 (1971), unless the contract provision which was repudiated by the respondent is a mandatory subject of bargaining, the action taken by the respondent in refusing to adhere to the provision is not violative of the Act.

On the basis of the foregoing, having found that the contract provisions as applied to Respondent are nonmandatory subjects of bargaining, I shall dismiss the complaint herein.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent has not violated the Act as alleged.

[Recommended Order for dismissal omitted from publication.]